No. 93-1117

Supreme Court, U.S.
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In The

Supreme Court Of The United States

October Term 1993

OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD. and ROBERT DAVIS d/b/a DAVIS MARINE INSURANCE AGENCY,

Petitioners,

vs.

EDISON WILSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can a federal appellate court review a district court order which finds a case was untimely removed under 28 U.S.C. § 1446(b), where the case was removed pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 205?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Edison Wilson respectfully requests this Court to decline to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on October 12, 1993.

CITATIONS OF OPINIONS BELOW

Petitioners have included all the opinions below in this case in their appendix. However, the Eleventh Circuit Court of Appeals only wrote a brief order in the case now before this Court. The opinion of the Eleventh Circuit on the issues now presented was written in full in a related case. *In re Ocean Marine Mut. Protection and Indem. Ass'n*, 3 F.3d 353 (11th Cir. 1993)[hereinafter *Deras*]. For the Court's convenience, that opinion is reprinted in the Appendix to this brief.

STATEMENT OF THE CASE[1/]

The underlying action. Edison Wilson was a seaman who was severely injured in an accident while returning to his ship, the M/V TOMA. Andy Corp. and ATA Nautical Corp. ("Andy/ATA") owned the vessel. Ocean Marine Mutual Protection and Indemnity Association Ltd. ("Ocean Marine") provided coverage to Andy/ATA and the M/V TOMA. It refused to defend or settle the claim. Wilson obtained a consent judgment against Andy/ATA and the vessel for $275,000. As part of the consent judgment/settlement agreement, Andy/ATA assigned its rights against Ocean Marine and others to Wilson. Ocean Marine refused to pay the judgment.

This case. Wilson then filed this action against Ocean Marine and Davis, the agent who had procured insurance coverage for Andy/ATA. Wilson filed the action in state court.

The claims against Ocean Marine arose out of the insurance agreement between Andy/ATA and Ocean Marine. That agreement contained an international arbitration provision which

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1/ Plaintiff/Respondent Edison Wilson will be referred to as he stands in this Court and by name. Petitioners/Defendants Ocean Marine Mutual Protection and Indemnity Association, Ltd. and Robert Davis d/b/a Davis Marine Insurance Agency will be referred to as they stand in this Court and as Ocean Marine and Davis. Emphasis is by counsel unless otherwise noted.

states:

> If any differences or disputes shall arise *between a member and the Association* out of or in connection with these Rules or any contract *between them* or as to the rights and obligations of the Association or the member thereunder or in connection therewith such differences or dispute shall in the first instance be referred to and adjudicated upon by the Directors. . . .
>
> If the member concerned in such differences or disputes does not accept the decision of the Directors or if the Directors shall fail to make any decision within three months of the reference to them of the difference or the dispute, it shall be referred to arbitration in London . . . .

(Emphasis added).

Davis, a Florida insurance agent, was not a party to this agreement between Ocean Marine [the Association] and Andy/ATA [the member]. The claims against Davis, therefore, did *not* arise out of the insurance contract. Instead, Wilson, as Andy/ATA's assignee, sued Davis for negligence in failing to obtain adequate coverage for Andy/ATA and in selecting an insurance company which he knew or should have known did not pay its claims.[2/]

The removal. About four months after he was served, Davis filed a notice of removal to the United States District Court for the Southern District of Florida. Ocean Marine filed a

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2/ In their petition at 3-4, Ocean Marine and Davis claim that Wilson seeks recovery from Davis "under the OCEAN MARINE Policy." As explained above, that is simply not the case. *See also Deras*, 3 F.3d at 354 ("the claims against Davis . . . allege negligence for failure to obtain adequate insurance coverage.").

special appearance for the limited purpose of consenting to removal. Davis claimed that removal was proper under 9 U.S.C. § 201 *et seq.*, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and 28 U.S.C. § 1441(c).[3/]

Wilson moved to remand within 30 days of removal.[4/] He argued that Davis was not entitled to remove the action against him. Davis could not invoke 9 U.S.C. § 205 because he had no arbitration agreement with Andy/ATA and § 205 does not authorize removal of joined claims. Nor could Davis rely on 28 U.S.C. § 1441(c) because the claims against him are not separate and independent from the claims against Ocean Marine.

Shortly after it received Wilson's motion, the court granted it. It did not address the grounds Wilson had raised. Instead, the court ruled that the requirement of 28 U.S.C. § 1446(b) that cases be removed within 30 days of service applied to cases removed under 9 U.S.C. § 205. The court remanded the case because Davis had not removed for almost four months.

Within ten days, Davis and Ocean Marine moved to reconsider the remand order. They claimed the district court could reconsider the remand order because the district court clerk had not yet transmitted the certified copy of remand to the state court pursuant to 28 U.S.C. § 1447(c).

The district court granted rehearing. The court rejected its previous determination that § 205 incorporated the 30-day requirement. It then rejected Wilson's arguments on the merits. It found that the claims against Davis were sufficiently related to the arbitration clause to fall within § 205, even though Davis was

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3/ Although the notice of removal cites only 9 U.S.C. § 205, Davis invoked 28 U.S.C. § 1441(c) as well in his memorandum in support of removal.

4/ Although the district court did not grant the motion on procedural grounds within the 30-day period, it was free to do so because the motion was filed within the time limit. *Compare* Fed.R.Civ.P. 59(d).

not a party to the arbitration agreement. The court did not address Wilson's arguments under 28 U.S.C. § 1441(c).

Wilson moved for rehearing. He suggested that the court did not have jurisdiction to grant Davis' and Ocean Marine's motion for rehearing in the first place. Once the court issued the remand order, it had no jurisdiction to reconsider its order, regardless of the status of the clerk's certificate, a ministerial act unrelated to the court's jurisdiction. The district court granted that motion. It vacated its first rehearing order and reinstated the original remand order. Davis and Ocean Marine filed a petition for writ of mandamus in the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit dismissed the petition in a brief order which addressed neither the facts nor the law. In *Deras*, another case which the Eleventh Circuit reviewed at the same time and which also involved Ocean Marine, Davis, the same arbitration clause, the same removal issues, but a different injured plaintiff named Deras, the court wrote an opinion which explained why it found that the remand orders at issue in both *Wilson* and *Deras* could not be reviewed by the district court, the circuit court "or otherwise."

SUMMARY OF ARGUMENT

The district court remanded this case to state court on procedural grounds as authorized by 28 U.S.C. § 1447(c). Pursuant to 28 U.S.C. § 1447(d), remands on procedural grounds are not reviewable by either the district court on rehearing or by the appellate court, on appeal or otherwise. This rule barring review applies even if the remand was wrong.

Ocean Marine and Davis have attempted to get around these rules by claiming that § 1447(d) does not limit review of remand orders entered pursuant to the special removal statute of the Convention on the Recognition of Foreign Arbitral Awards. There is nothing in the Convention to indicate such intent. And

this Court has long held that the limitation on review of remand orders applies even to cases removed under special removal statutes, unless Congress has specifically stated otherwise. Some special removal statutes contain statements by Congress that remand orders under those statutes shall be reviewable. The Convention does not.

Ocean Marine and Davis claim that this Court should take jurisdiction of this case because there is a conflict in the circuits on the issue of whether § 1447(d) precludes review of orders entered pursuant to special removal statutes. There is no such conflict. The circuits are all in accord: if the special removal statute contains no statement of Congressional intent to permit review, then § 1447(d) applies and no review is permitted. The two primary cases on which Ocean Marine and Davis rely have each been criticized and revised by later opinions of the same circuits that wrote them.

Finally, this entire petition is premised on the assumption that Davis had an absolute right of removal. That assumption is incorrect. Davis, the only party who filed a notice of removal, improperly relied on the special removal statute because he was not a party to an international arbitration agreement and the claim against him did not arise out of such an agreement. Nor does Wilson concede that Ocean Marine could have removed the case either.

In sum, this case was decided consistently with every other circuit that addressed an analogous issue. The Eleventh Circuit was correct; it had no jurisdiction to review this case. This Court should deny the petition for writ of certiorari.

ARGUMENT
REASONS FOR DENYING THE WRIT

This case is a classic example of the reason for the general rule that remand orders are not reviewable. The purpose of the prohibition against review of such orders is to avoid delay in addressing the merits of a case because of prolonged litigation over the forum. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351, 96 S.Ct. 584, 593 (1976); *United States v. Rice*, 327 U.S. 742, 751-52, 66 S.Ct. 835, 839 (1946); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 396 n.9 (5th Cir. 1981). That is precisely what is happening here. This Court should deny the writ of certiorari. The Eleventh Circuit correctly ruled that it had no jurisdiction to review the district court orders relating to the remand of this case to state court. This ruling is consistent with the rulings of other circuits. Moreover, contrary to Ocean Marine's and Davis' contention, Davis did not properly remove this case.

The § 1447(d) prohibition on review of remand orders applies here -- "The horse before the cart."

Review of all remand orders is governed by 28 U.S.C. § 1447, regardless of the basis for removal. See argument *infra* at 11-13. Thus, an understanding of the Eleventh Circuit's decision should begin and end with review of that statute and not, as Ocean Marine and Davis have done, with review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The basis for the general rule that prohibits review of remand orders is 28 U.S.C. § 1447(d). It provides:

> An order remanding a case to the State court from which it was removed is not reviewable *on appeal or otherwise*, except that an order remanding a case to the State court from which it

> was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

This section bars reconsideration of a remand order by the district court on rehearing and by the appellate court through appeal or writ of mandamus. *See Thermtron*, 423 U.S. 336, 96 S.Ct. 584.[5/] Significantly, review is foreclosed even if the district court erroneously remanded the case. *Id.* at 343, 96 S.Ct. at 589. Thus, Davis' and Ocean Marine's emphasis on the alleged erroneous reasoning behind the district court's first remand order is misplaced. The threshold question is whether § 1447(d) applies to this order. If it does, it is unreviewable -- right or wrong. *See In re Medscope Marine Ltd.*, 972 F.2d 107 (5th Cir. 1992)(court will not reach question of whether remand was erroneous because unreviewable under § 1447(d)).

By its terms, § 1447(d) appears to proscribe any review of remand orders. However, in *Thermtron*, this Court held that 28 U.S.C. § 1447(c) only prohibited review of remand orders issued pursuant to § 1447(d). 423 U.S. at 346, 96 S.Ct. at 590.

> Remands based on considerations outside § 1447(c), *e.g.*, a crowded docket, were an exception to § 1447(d) and remained subject to review on mandamus.

Deras, 3 F.3d at 355 (citing *Thermtron*, 423 U.S. at 344-45, 96 S.Ct. at 590).

Thus, this Court must first determine whether the original remand order in this case was issued pursuant to § 1447(c). It

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5/ Mandamus is the only potential vehicle for review and it is limited. *Thermtron*, 423 U.S. at 343, 96 S.Ct. at 589.

was.[6/] When this Court decided *Thermtron*, this subsection provided:

> If at any time before final judgment it appears that the case was removed *improvidently and without jurisdiction*, the district court shall remand the case, and may order the payment of just costs.

423 U.S. at 342, 96 S.Ct. at 589. This subsection was amended in 1988[7/] to read:

> A motion to remand the case on the basis of *any defect in removal procedure* must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court *lacks subject matter jurisdiction*, the case shall be remanded.

28 U.S.C. § 1447(c) (1988). *See Deras*, 3 F.3d at 355.[8/]

6/ The district court did not cite § 1447(c) in its order. But its failure to do so is not dispositive.

> [E]ven if the trial court neither states as grounds for remand the specific words of § 1447(c) nor cites the statute itself, the order is unreviewable if, by substantially similar language, it is evident that the court intends to remand for the grounds recited in § 1447(c).

Tillman v. CSX Transp., Inc., 929 F.2d 1023, 1027 (5th Cir. 1991).

7/ P.L. 100-702, Title X, § 1016(c), 102 Stat. 4670.

8/ The district court in *Deras* followed the district court in this case and remanded the case for failure to comply with the requirements of § 1446(b). 3 F.3d at 354. As in this case, Davis and Ocean Marine sought a writ of manda-

(continued...)

Remands based on defects in removal procedure, such as untimeliness, formerly were covered under the phrase "removed improvidently." *See Royal v. State Farm Fire & Cas. Co.*, 685 F.2d 124, 127 (5th Cir. 1982). Although the words "removed improvidently" have been deleted, procedural defects remain a basis for remand under § 1447(c). The statute merely places a time limit on raising such procedural defects. Therefore, a remand based either on lack of jurisdiction or on a defect in removal procedure such as untimeliness still comes under § 1447(c).[9/] *Deras*, 3 F.3d at 355; *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 986 F.2d 48, 50 (3d Cir. 1993); *In re Medscope Marine Ltd.*, 972 F.2d at 109-10.

The district court here held in its original remand order that Davis had not complied with the time requirements of § 1446(b).[10/] Failure to comply with the requirements of §

8/ (...continued)
mus in the Eleventh Circuit to vacate the remand order. As in this case, the Eleventh Circuit dismissed the petition for writ of mandamus. It held that § 1447(d) precluded review of the remand order. *Id.* at 355-56. Davis and Ocean Marine have not sought a writ of certiorari on that case.

9/ This interpretation is supported by the limited legislative history of the 1988 amendment to § 1447(c). It indicates that the amendment was intended to prevent "a party who is aware of a defect in removal procedure [from] . . . hold[ing] a defect in reserve as a means of forum shopping." H.R.Rep. No. 889, 100th Cong., 2d Sess.1988, *reprinted in* 1988 U.S.C.C.A.N. 5982, 6033. *See also In re Medscope Marine Ltd.*, 972 F.2d at 109.

10/ Although the order clearly was based on a defect in removal procedure, Davis and Ocean Marine seek to avoid this conclusion by arguing that the order was not entered pursuant to § 1447(c) because Wilson had not *sought* remand on that basis. They cite no authority for the proposition that the grounds on which remand is sought is dispositive. Indeed, under *Thermtron*, review is prohibited where the remand order is *issued* under § 1447(c). 423 U.S. at 346, 96 S.Ct. at 590. Furthermore, the motion was filed within the 30-day period and was still pending at the time the district court decided on its own to remand the case on procedural grounds. *Compare* Fed.R.Civ.P. 59(d) *with Smith v.* (continued...)

1446(b) is a defect in removal procedure with the meaning of § 1447(c). *Deras*, 3 F.3d at 356; *Alleghany Corp. v. United States Dist. Ct.*, 881 F.2d 777 (9th Cir. 1989). Thus, this remand order was entered pursuant to § 1447(c). Whether or not that order was correct, it was unreviewable by the district court (on motion for reconsideration) and was unreviewable by the Eleventh Circuit (on petition for writ of mandamus) under § 1447(d).

The Convention does not alter the plain language of § 1447(d) -- "Leading the horse away from the garden path."

Davis and Ocean Marine argue that § 1447(d) does not apply to this order because the case was removed pursuant to a special removal statute -- the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 205 ("the Convention"). That argument fails.

In *United States v. Rice*, this Court considered a case removed under a special removal statute. 327 U.S. at 744-45, 66 S.Ct. at 836. This Court held that the limitation on review in the predecessor to § 1447(d)[11/] applied to cases removed under special removal statutes, not merely those removed under § 1441:

> [T]hese provisions [governing removal procedure and remands] were intended to be applicable not only to remand orders made in the suits removed under [the general removal statutes], *but to orders of remand made in cases removed under any other statutes as well.*

10/ (...continued)
City of Picayune, 795 F.2d 482, 484 (5th Cir. 1986)(district court has power to consider correctness of grounds for removal on its own).

11/ The limitation found in § 1447(d) has remained substantially unchanged since its enactment in 1887. *Thermtron*, 423 U.S. at 343, 96 S.Ct. at 89.

327 U.S. at 752, 66 S.Ct. at 839. Congress did not indicate any intent to exempt cases removed under that special statute from the general remand act. *Id.* at 752-53, 66 S.Ct. at 839. Therefore, this Court found that the remand order was not reviewable by mandamus or otherwise. *Id.* at 753, 66 S.Ct. at 839.

Contrary to Petitioners' argument, *Thermtron* does not alter this holding. It does not limit the class of cases to which § 1447(d) applies based on the authority for removal. Instead, *Thermtron* simply limits the applicability of § 1447(d) based on the method by which the cases are remanded. Regardless of whether the case is removed pursuant to a special statute or a general removal statute, the § 1447(d) prohibition against review applies if the trial court purports to remand it under § 1447(c). *See* 423 U.S. at 342-46, 96 S.Ct. at 589-90. *See also Deras*, 3 F.3d at 355.

In *Thermtron*, the district court remanded the case because the court's crowded docket would delay proceeding to trial. This Court found that consideration irrelevant to the court's jurisdiction to hear the case or to the procedure by which it was removed. Thus, it was not a ground authorized by § 1447(c). This Court declined to construe the prohibition against review of remand orders in § 1447(d)

> so as to extinguish the power of an appellate court to correct a district court that has not merely erred in applying the requisite provision for remand but has remanded a case on *grounds not specified in the statute and not touching the propriety of the removal*.

423 U.S. at 352, 96 S.Ct. at 593.

By contrast, the district court here remanded the case because Davis failed to comply with the time limits in § 1446(b). While the district court may have erred in doing so on those grounds, its action was not unauthorized. Therefore, *Thermtron*

does not alter *Rice* as applied to this case. Davis' reliance on the special provision of the Convention for removal does not alter the rule of nonreviewability found in the general remand statute, § 1447(d).

There is no conflict among the circuits on this issue that requires resolution by this Court -- "Clearing away the underbrush."

Contrary to Davis' and Ocean Marine's contention, the circuit courts are unanimous on this issue. This was not the first case in which a similar issue arose. As the Eleventh Circuit said in *Deras*:

> Two other circuits have addressed this issue, however, concluding that § 1447(d) precludes review of an order of remand based upon a timely § 1447(c) motion to remand for defects in removal procedure. We find these circuits' reasoning persuasive and agree that a remand order based on a timely § 1447(c) motion to remand for defects in removal procedure is unreviewable pursuant to § 1447(d).

3 F.3d at 355 (citations omitted).

First, Davis and Ocean Marine rely on the Eleventh Circuit's decision in *In re Fed. Sav. & Loan Ins. Corp.*, 837 F.2d 432 (11th Cir. 1988)[hereinafter *FSLIC*].[12/] They claim it "held" that § 1447(c) does not apply to cases removed pursuant to a special removal statute. *FSLIC* did not so "hold." In dicta, it summarily limited the application of § 1447(c) to cases which had been removed pursuant to § 1441(a). This apparently excluded from § 1447(c) any case removed pursuant to a special

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12/ This would not give rise to conflict among the circuits; it is the same circuit that issued the opinion here.

removal statute. *FSLIC* did not discuss *Rice*.

The Eleventh Circuit made clear in *Deras* that *FSLIC*'s cursory comments were limited to cases removed under 12 U.S.C. § 1730(k)(1), the removal provision of the FSLIC statute. 3 F.3d at 356 n.4. *See also In re Savers Fed. Sav. & Loan Ass'n*, 872 F.2d 963, 965 (11th Cir. 1989)(remand of cases removed pursuant to FSLIC statute reviewable by mandamus).

In fact, as *Deras* noted, the three other circuits which have considered this issue all criticized *FSLIC* because it appears to conflict with *Rice*. *Deras*, 3 F.3d at 356 n.4 (citing *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3d Cir. 1991); *In re Fed. Sav. & Loan Ins. Corp.*, 881 F.2d 564 (8th Cir. 1989); *Fed. Sav. & Loan Ins. Corp. v. Frumenti Dev. Corp.*, 857 F.2d 665 (9th Cir. 1988)).[13/] *Deras* has now resolved that criticism.

FSLIC cited only one case in support of the proposition that § 1447(c) is limited to cases removed under § 1441(a) -- the Third Circuit's decision in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984). Davis and Ocean Marine also rely on *Pacor*. In *Pacor*, the court held that the general removal provisions of §§ 1441-47 did not apply to cases removed to the bankruptcy court under 28 U.S.C. § 1478 (amended and now codified as 28 U.S.C. § 1452). The Third Circuit recently discussed its *Pacor* decision and *FSLIC*'s reliance on that decision. *In re TMI Litigation*, 940 F.2d at 838-39 n.4. The court rejected *FSLIC*'s broad interpretation of *Pacor* in light of *Rice*. *Id.* It noted that its holding in *Pacor* was very narrow. Thus, even the court which authored the one case on which *FSLIC* relied disagrees with such

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13/ *Frumenti* did state that "*Thermtron* creates an exception to section 1447(d)'s general review preclusion only for remand orders that are not based on jurisdictional grounds." 857 F.2d at 670. However, as the order at issue was based on jurisdictional grounds, the court did not consider if defects in removal procedure came under *Thermtron*.

a narrow interpretation of § 1447(c).[14/]

The other cases on which Davis and Ocean Marine rely are equally inapplicable. In *Massachusetts v. V & M Mgt., Inc.*, 929 F.2d 830 (1st Cir. 1991), remand was not based on either a lack of jurisdiction or a defect in removal procedure. Thus, it was not issued pursuant to § 1447(c) and was reviewable under *Thermtron*. *Id.* at 832-33. *See also Maniar v. FDIC*, 979 F.2d 782, 784-85 (3d Cir. 1992)(*sua sponte* remand for procedural defect more than 30 days after removal violated time limits for raising procedural defects under § 1447(c) and thus was unauthorized by that statute; remand reviewable under *Thermtron*);[15/] *Air-Shields, Inc. v. Fullam*, 891 F.2d 63 (3d Cir. 1989)(remand reviewable because court improperly remanded based on old version of § 1447(c); remand not authorized by current statute); *Levy v. Weissman*, 671 F.2d 766 (3d Cir. 1982)(remand for failure to follow local rule not based on ground authorized by §

14/ Davis and Ocean Marine attempt to argue that *TMI* supports their position because the court in that case found that it had the authority to review the remand order in question. However, the court reached that conclusion because district court had found the removal statute in question unconstitutional. The *TMI* court stated that § 1447(d) did not intend to insulate a district court's ruling on the unconstitutionality of a statute from appellate review. 940 F.2d at 843. The district court here made no such substantive ruling as a basis for the remand. *See also McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199 (5th Cir. 1991); *Clorox Co. v. United States Dist. Ct.*, 779 F.2d 517 (9th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273 (9th Cir. 1984)(in all these cases the court was required to make substantive rulings before remand).

15/ Davis and Ocean Marine also rely on *Maniar* to argue that the district court's original remand order was reviewable because it was based on a procedural defect not raised by Wilson and was filed more than 30 days after removal. However, unlike *Maniar*, Wilson did file a motion to remand within the 30-day period. Although the district court did not grant the motion within the 30-day period, it should be free to do so, as long as a motion was filed within the time limit. *See In re Medscope Marine Ltd.*, 972 F.2d at 109-10 (legislative history indicates § 1447(c) intended to place time limitation on filing motion to remand based on procedural defect). *Compare* Fed.R.Civ.P. 59(d).

1447(c) and thus reviewable).

Further, in *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990), the First Circuit noted a recent amendment to a relevant statute that expressly set out Congressional policy to protect federal employees by insuring their right to have actions against them determined in federal court. *Id.* at 811. The court thus found express Congressional intent to permit review of orders remanding such cases to state court. *Id.* This conclusion is fully consistent with *Rice*. However, *Rice* found no express Congressional intent in that special removal statute to permit review of remand orders. Nor is any present here.

The circuits therefore unanimously and uniformly apply *Rice* and hold that, absent specific Congressional intent to the contrary, the prohibition against review of remand orders in § 1447(d) applies where the case was removed pursuant to a special removal statute.[16/] There is no express Congressional intent to permit review of orders that remand cases removed under the Convention.[17/] Thus there is no conflict between the circuits. The petition for writ of certiorari should be denied.

16/ Davis and Ocean Marine note that Congress has since amended the removal statute at issue in *FSLIC* to expressly provide for review of remand orders in cases removed pursuant to that statute. *See* 12 U.S.C. § 1821 *et seq.* This amendment actually supports Wilson's position. If Congress intended to exclude all cases removed pursuant to special removal statutes from the provisions of § 1447(d), such an amendment would be unnecessary. Moreover, although Congress amended the FSLIC statute to provide for review of remand orders, it did not do so for the Convention.

17/ Davis and Ocean Marine claim that this Court should ignore the Eleventh Circuit's decision in *Deras* because "[i]t improperly and arbitrarily treats litigants under special removal statutes differently." Petition for Writ of Certiorari at 13 n.6. However, *Deras* merely followed this Court's mandate in *Rice* that remand orders cannot be reviewed, regardless of the basis for removal, absent express Congressional intent to the contrary.

This case was not properly removed under 9 U.S.C. § 205 -- "Arriving at the right destination without getting lost along the way."

Throughout their petition, Davis and Ocean Marine assume that the district court's first order on rehearing, which found that Davis had properly removed the case, was correct on the merits. This response would not be complete if it failed to refute that fundamentally incorrect assumption. Davis was not entitled to remove this case in the first place. To the extent the district court's order so found, it was incorrect.

Davis removed this case and cited 9 U.S.C. § 205.[18/] Ocean Marine did not remove this case; it only filed a special appearance for the limited purpose of consenting to removal. Davis claims he is entitled to remove this case under § 205 because the agreement between the two other parties, Ocean Marine and Andy/ATA (Wilson's assignor), contains an arbitration provision subject to the Convention. That position must fail for two reasons.

First, Davis is not entitled to invoke this provision. Davis, a Florida insurance agent, was not a party to the agreement between Ocean Marine and Andy/ATA. The claims against Davis, therefore, did *not* arise out of the insurance contract.

18/ 9 U.S.C. § 205 provides in pertinent part:

> Where the subject matter of an action or proceeding pending in a State court *relates to an arbitration agreement* or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. . . .

Ocean Marine and Andy/ATA are the *only* parties to the arbitration agreement. When Davis removed this case and the court remanded it, no one had sought arbitration. Thus, this Court is faced with a removal petition filed by one who is not a party to the arbitration agreement where neither party to the agreement had invoked it at that time and where the claim against the removing party does not arise out of the insurance agreement that contains the arbitration clause. No matter how one looks at it, the claims against Davis do not fall within § 205.

Second, § 205 does not authorize removal of joined claims not subject to arbitration. If a dispute is subject to arbitration under the Convention, then *that* cause of action may be removed to federal court by the defendant who is a party to the arbitration agreement at any time prior to trial. Indeed, the plain language of the statute limits what may be removed to "such action or proceeding," referring to one in which the subject matter "relates to an arbitration agreement."

The claims against Davis do not relate to an arbitration agreement. Therefore, even though the claims against Ocean Marine may arguably be subject to arbitration under the Convention and thus theoretically removable by Ocean Marine under § 205, that section does not authorize the removal of the claims against Davis which are not subject to arbitration.[19/] Davis' attempt to remove this entire case under § 205 must fail.

In *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 713 (7th Cir. 1992), the Seventh Circuit made the following observations in denying a writ of mandamus to petitioners seeking removal under § 205:

> Arbitration is supposed to be quick. Litigation about arbitration frustrates that objective. Litiga-

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19/ Wilson does not concede that his claim against Ocean Marine must be arbitrated. Wilson was not a party to the arbitration agreement. That obligation was never assigned to him.

> tion about *where to litigate* about arbitration mocks that objective.
>
> * * *
>
> It is time to get down to the merits. Wisconsin will decide the meaning of the treaties; interpretation of contracts is a staple of business in state courts. The [Petitioners] do not contend that Wisconsin disfavors arbitration or that any other doctrine or practice used there would inhibit prompt and accurate resolution of the parties' dispute. Eight months of litigation about where to litigate is plenty.

964 F.2d at 713 (emphasis by court).

This dispute also has gone on long enough. The complaint was filed two years ago and still has not been answered. The Florida state court can determine if Davis' claims can be arbitrated under the agreement, should Davis ever decide to file a motion to compel arbitration. The Florida court can also decide if it has jurisdiction over Ocean Marine. If the state court finds it has jurisdiction over Ocean Marine, Ocean Marine can try to have that court compel arbitration. There is no allegation that Davis' inability to litigate in federal court under § 205 precludes any of this. Davis simply failed to meet his burden of establishing that removal was proper. The Eleventh Circuit properly denied the petition for writ of mandamus. The petition for writ of certiorari should likewise be denied.

CONCLUSION

For the foregoing reasons, Wilson respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-4639

(Filed Sept. 15, 1993)

IN RE:

OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD., ROBERT DAVIS, d/b/a DAVIS MARINE INSURANCE AGENCY, and MARIMAR MARINE INDUSTRIES, INC.,

Petitioners.

On Petition for Writ of Mandamus or on Petition for Writ of Prohibition to the United States District Court for the Southern District of Florida.

Before EDMONDSON, COX and CARNES, Circuit Judges.

PER CURIAM:

FACTS AND PROCEDURAL HISTORY

Ricardo Deras filed an action in Florida state court in 1989 against Ocean Marine Mutual Protection and Indemnity Association, Ltd., a British insurer ("Ocean Marine"), Robert Davis, and Marimar Marine Industries, Inc. ("Marimar"). Deras' claims against Ocean Marine are based on an insurance agreement; the claims against Davis and Marimar allege negligence for failure to obtain adequate insurance coverage. In

December 1991, Deras obtained a default judgment against Ocean Marine, which never answered his complaint. In May 1992, Marimar asserted that the case fell under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1/] and removed it to federal court pursuant to 9 U.S.C. § 205 (1988).

Deras then filed a timely motion to remand the case to state court. Deras contended that the action did not fall under the New York Convention and that Marimar had failed to follow proper removal procedure because all of the defendants did not join in removal as required by 28 U.S.C. § 1446(a)(1988). Davis subsequently joined in the petition for removal, and Ocean Marine filed a special appearance consenting to removal.

In March 1993, the district court granted Deras' motion to remand "for Defendants' failure to comply with § 1446(a) and (b)." (Order of Remand at 1). To support its decision, the district court cited, among other cases, *Wilson v. Ocean Marine Mut. Protection & Indem. Ass'n*, No. 92-1505-CIV-NESBITT (S.D.Fla. Aug. 4, 1992), *vacated*, Oct. 16, 1992, *reinstated*, Jan. 7, 1993 (concluding that 9 U.S.C. § 205 retains the § 1446(b) thirty-day time limit for filing notice of removal) and *Woods v. Firestone Tire & Rubber Co.*, 560 F.Supp. 588 (S.D.Fla. 1983)(holding that all defendants must join in the notice of removal).

DISCUSSION

The defendants (petitioners) seek a writ of mandamus, or alternatively a writ of prohibition, directing the district court to vacate the Order of Remand. Deras responds that, pursuant to

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1/ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted following* 9 U.S.C.A. § 201 (West Supp.1993)[hereinafter New York Convention].

28 U.S.C. § 1447(d)(1988),[2/] the district court's remand order is not reviewable on mandamus. Because we conclude that § 1447(d) precludes our review of the district court's remand order, we dismiss the petition for lack of jurisdiction.

By its terms, § 1447(d) appears to proscribe any review of remand orders. In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), however, the Supreme Court held that § 1447(d) only prohibited review of remand orders issued pursuant to 28 U.S.C. § 1447(c). When *Thermtron* was decided, § 1447(c) provided for remand of cases that had been removed "improvidently and without jurisdiction." 423 U.S. at 342, 96 S.Ct. at 589. Remands based on considerations outside § 1447(c), *e.g.*, a crowded docket, were an exception to § 1447(d) and remained subject to review on mandamus. *Id.* at 344-45, 96 S.Ct. at 590.

In 1988, Congress amended § 1447(c) to read:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . .

28 U.S.C. § 1447(c) (1988). While it was generally accepted that cases remanded for lack of subject matter jurisdiction

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2/ 28 U.S.C. § 1447(d)(1988) provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

This case was not removed pursuant to § 1443, which provides for the removal of civil rights cases.

remained immune from review after the 1988 amendment, *see, e.g., Harris v. Blue Cross/Blue Shield of Ala.*, 951 F.2d 325, 326-27 (11th Cir.1992), the status of cases remanded for defects in removal procedure was less certain. *See McDermott Int'l v. Lloyds Underwriters of London*, 944 F.2d 1199, 1201 (5th Cir.1991). The reviewability of a remand order based on a timely § 1447(c) motion to remand for defects in removal procedure is an issue of first impression in this circuit.

Two other circuits have addressed this issue, however, concluding that § 1447(d) precludes review of an order of remand based upon a timely § 1447(c) motion to remand for defects in removal procedure. *In re Medscope Marine Ltd.*, 972 F.2d 107 (5th Cir.1992); *Foster v. Mutual Fire, Marine & Inland Ins. Co.*, 986 F.2d 48, 50 (3d Cir.1993); *see also Creekmore v. Food Lion, Inc.*, 797 F.Supp. 505 (E.D.Va.1992). We find these circuits' reasoning persuasive and agree that a remand order based on a timely § 1447(c) motion to remand for defects in removal procedure is unreviewable pursuant to § 1447(d).[3/]

In this case the district court remanded the action after Deras filed a timely motion alleging inapplicability of the New York Convention and defects in the removal procedure employed by the defendants. The court premised its decision on the defendants' failure to comply with § 1446(a) and (b), citing cases which held that all defendants must join the notice of removal under § 1446(a) within thirty days of the time when the case becomes removable under § 1446(b). The procedural requirements of § 1446(a) and (b) are generally applicable to a removal under the New York Convention, because 9 U.S.C. §

3/ It may be that an order of remand based on an *untimely* motion to remand for defects in removal procedure is reviewable on mandamus. *See In re Shell Oil Co.*, 932 F.2d 1518 (5th Cir.1991), *cert. denied*, --- U.S. ---, 112 S.Ct. 914, 116 L.Ed.2d 814 (1992); *Air-Shields, Inc. v. Fullam*, 891 F.2d 63 (3d Cir.1989). Because Deras' motion was timely, we need not address the reviewability of a remand order based on an untimely motion to remand for defects in removal procedure.

205 provides that "[t]he procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal." *See In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 712 (7th Cir.1992). Failure to comply with § 1446(a) and (b) constitutes a defect in removal procedure within the meaning of § 1447(c). *See Wilson v. General Motors Corp.*, 888 F.2d 779, 781 n. 1 (11th Cir.1989).

The district court's remand order is based upon a timely § 1447(c) motion to remand for defects in removal procedure.[4/] Therefore the remand order, "whether erroneous or not," is not subject to review in this court pursuant to § 1447(d). *Thermtron*, 423 U.S. at 343, 96 S.Ct. at 589. Because the district court's order is not subject to review, we do not reach the question of the applicability of the New York Convention to Deras' state court action or the question of defendants' joinder; we state no opinion as to the correctness of the district court's conclusion that 9 U.S.C. § 205 retains the thirty-day time limit of § 1446(b) for the same reason.

The defendants' application for a writ of mandamus, or alternatively a writ of prohibition, is dismissed for lack of jurisdiction.

4/ We have previously stated that "[s]ection 1447(c)'s application is . . . limited to cases removed from state court pursuant to section 1441(a)." *In re Federal Sav. & Loan Ins. Corp.*, 837 F.2d 432, 436 (11th Cir.1988). We made this statement in a case removed under 12 U.S.C. § 1730(k)(1) (1988), which authorizes the FSLIC to remove to federal court when acting as the receiver of a federal savings and loan association; it is dictum as to cases removed under other statutes. Moreover, our statement has been criticized as conflicting with the Supreme Court's decision in *United States v. Rice*, 327 U.S. 742, 66 S.Ct. 835, 90 L.Ed. 982 (1946). *See In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 838-39 n. 4 (3d Cir.1991), *cert. denied*, --- U.S. ---, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992); *Federal Sav. & Loan Ins. Corp v. Frumenti Dev. Corp.*, 857 F.2d 665 (9th Cir.1988).